ADJUSTMENT OF STATUS
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1. Removal Proceedings

Removal proceedings are commenced with the filing of a notice to appear in immigration court pursuant to 8 U.S.C. § 1229. Once removal proceedings have commenced, an alien must file his adjustment of status application in immigration court, and may not file the application with the Bureau of Citizenship and Immigration Service ("BCIS," formerly "INS"). *See* 8 U.S.C. § 1229a(3).

*2. **Visa Petition*** (Form I-130 or I-140)

In order to be eligible for adjustment of status, an alien must be eligible to file a visa petition pursuant to 8 U.S.C. § 1154. The visa petition is the alien's petition to prove that he may be classified in one of the family or employment categories listed in 8 U.S.C. § 1153. The approval of a visa petition does not confer the alien any sort of legal status or right to remain in the U.S., nor does it mean that the alien will be granted adjustment of status. A visa petition is merely the BCIS' determination that the alien fits into one of the visa categories listed in 8 U.S.C. § 1153.

There are five categories of ***family-based*** visa petitions:

Immediate Relatives, 8 U.S.C. § 1151(b)(2)(A)(i): Spouses, children, and parents of U.S. citizens. An alien is not considered a "child" unless the alien is less than 21 years old, *see* 8 U.S.C. § 1101(b)(1). In addition, a U.S. citizen is not allowed to petition for his parent until he is at least 21 years old. *See* 8 U.S.C. § 1151(b)(2). **Note, immediate relatives are not subject to the priority date system.**

First Preference, 8 U.S.C. § 1153(a)(1): Unmarried Sons and Daughters of U.S. Citizens.

Second Preference A, 8 U.S.C. § 1153(a)(2)(A): Spouses and Children (<21) of Permanent Residents.

Second Preference B, 8 U.S.C. § 1153(a)(2)(B): Unmarried Sons and Daughters (>21) of Permanent Residents.

Third Preference, 8 U.S.C. § 1153(a)(3): Married Sons and Daughters of U.S. Citizens.

Fourth Preference, 8 U.S.C. § 1153(a)(4) : Brothers and Sisters of U.S. Citizens.

There are five categories of ***employment-based*** visa petitions:

First Preference, 8 U.S.C. § 1153(b)(1): Priority Workers.

Second Preference, 8 U.S.C. § 1153(b)(2): Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability.

Third Preference, 8 U.S.C. § 1153(b)(3): Skilled Workers, Professionals, and Other Workers.

Fourth Preference, 8 U.S.C. § 1153(b)(4): Certain Special Immigrants.

Fifth Preference: Employment Creation, 8 U.S.C. § 1153(b)(5).

Note on labor certifications: the majority of aliens wishing to be classified in the second and third employment preferences must file and receive an approved labor certification from the Department of Labor before filing for a visa petition. *See* 8 U.S.C. § 1153(b)(3)(C). A labor certification is not a visa petition, it is simply certification from the Department of Labor that willing and qualified U.S. workers are not available for a particular job. *See* 8 U.S.C. § 1182(a)(5)(A). Because a labor certification is not a visa petition, a filed and/or approved labor certification alone does not enable an alien to apply for adjustment of status. *See* 8 U.S.C. § 1255(a).

3. Priority Date

The United States will grant a total of 366,000 visas annually. The demand for visas outpaces this annual allotment. As a result, a priority date system has

been established in order to allocate these limited visas among the thousands of visa applicants (note: immediate relatives are not subject to the priority date system, but rather are provided as many visas as necessary each year). When an alien files a visa petition, he is given a priority date (the same date that the visa petition was received by the BCIS.) The alien must monitor whether his priority date is "current," i.e. whether there is a visa immediately available for him to use to immigrate to the U.S.

The 366,000 visas are divided up amongst the countries of the world, and then subdivided amongst the various employment-based and family-based immigration categories. Certain visa categories, especially for aliens from large countries, have become oversubscribed and have waiting lists of up to 20 years. An alien with an approved visa petition must continually check the visa bulletin, found on the State Department's website at travel.state.gov/visa to determine whether his priority date is current and, therefore, whether he may file an adjustment of status application.

4. Eligibility for Adjustment of Status Application

8 U.S.C. § 1255(a) allows an alien to file an adjustment of status application if the alien is eligible to receive an immigrant visa and the immigrant visa is immediately available. Although most aliens demonstrate eligibility to receive an immigrant visa through the filing and approval of a visa petition, such filing and approval are not required by statute. As a result, aliens who can demonstrate visa petition eligibility and an immediately available visa do not need to have an approved visa petition in order to file for adjustment of status. *See Matter of Velarde-Pacheco*, 23 I. & N. Dec. 253 (BIA 2002) (holding that an immediate relative's motion to reopen for adjustment of status based on marriage to a U.S. citizen could be approved notwithstanding the pendency of his I-130 visa petition where the alien provided evidence that his marriage was bona fide). As of February 2005, most of the employment-based immigration categories are current, and thus many employment-based immigrants are also eligible to file adjustment of status applications without approved visa petitions.

Beyond the visa petition and priority date requirements, an alien must prove that he is eligible for filing an adjustment of status application pursuant to 8 U.S.C. § 1255. The adjustment of status application itself is considered a benefit for

which only certain aliens qualify; others will be required to use the traditional procedure of applying for permanent residence at the U.S. consulate in their home countries. (*See* section 8). The primary requirements for filing an adjustment of status application are lawful entry to the U.S. and current lawful presence in the U.S. *See* 8 U.S.C. § 1255(c). There are exceptions to these requirements for immediate relatives (who must prove lawful entry but not current lawful status), *see* 8 U.S.C. § 1255(c)(2); for certain aliens who had visa petitions filed for them before April of 2001, *see* 8 U.S.C. § 1255(i); and for certain employment-based immigrants, *see* 8 U.S.C. § 1255(k).

A bar to adjustment of status frequently encountered is found in 8 U.S.C. § 1229c. This provision states that an alien is ineligible for adjustment of status if he overstays a grant of voluntary departure. For cases subject to pre-Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") law, this provision was interpreted to bar the adjustment of status of an alien who overstayed a grant of voluntary departure even if the alien filed a motion to reopen for adjustment of status before the voluntary departure period expired. *See* 8 U.S.C. § 1229c(d) (rendering aliens who overstay a grant of voluntary departure ineligible for certain relief including cancellation of removal); *see also Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998) (applying 8 U.S.C. § 1229c(d) to pre-IIRIRA deportation proceedings). This Court recently minimized the impact of 8 U.S.C. § 1229c by holding that in post-IIRIRA cases in which a motion to reopen is filed within the voluntary departure period and a stay of removal or voluntary departure is requested, the voluntary departure period will be tolled during the period the BIA is considering the motion. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005). The Court did not reach the question of whether filing a motion to reopen automatically tolls the voluntary departure period, although it stated that automatic tolling would be consistent with the legislative scheme.

5. Admissibility

Once it is determined that the alien is eligible to file the adjustment of status application, the immigration judge (IJ) must determine whether the alien is admissible to the U.S. by assessing the grounds of inadmissibility listed in 8 U.S.C. § 1182. This provision renders aliens inadmissible for many reasons including various crimes, prior immigration violations, indications that the alien will become a public charge, and various communicable diseases. Aliens found inadmissible

under certain provisions of 8 U.S.C. § 1182 may be eligible to apply for waivers listed throughout 8 U.S.C. § 1182, which usually require the alien to show hardship to a U.S. citizen relative.

The ground of admissibility listed in 8 U.S.C. § 1182(a)(9)(B) creates an impetus for aliens to apply for adjustment of status here in the U.S., rather than proceeding abroad to file for visa processing at a U.S. consulate (*See* Section 8). This is because 8 U.S.C. § 1182(a)(9)(B) bars an alien from being admitted to the U.S. for a period of three or ten years if he has accumulated at least six months of "unlawful presence" in the U.S. 8 U.S.C. § 1182 is drafted oddly, and only renders an alien inadmissible when the alien accrues unlawful presence in the U.S. and then departs the U.S. and applies to re-enter. As a result, many aliens only may be granted lawful permanent residence if they are able to file adjustment of status applications in the U.S., rather than proceeding abroad and applying from their home countries.

The grounds of inadmissibility are different from the grounds of removability listed in 8 U.S.C. § 1227. Therefore, even if an IJ has already determined that the alien is removable pursuant to 8 U.S.C. § 1227, the IJ could still determine that the alien is admissible pursuant to 8 U.S.C. § 1182 and the alien could be granted lawful permanent residence. For instance, a crime of domestic violence is a ground of removability, but not a ground of inadmissibility. Therefore, if an alien is found to be removable for having committed a crime of domestic violence, the IJ must undertake a separate analysis to determine whether the same crime bars the alien's adjustment of status application pursuant to the criminal grounds of inadmissibility listed in 8 U.S.C. § 1182.

Note that even if an alien is eligible to file an adjustment of status application and is admissible, the adjustment of status application may still be denied in the exercise of discretion. *See* 8 U.S.C. § 1255.

6. Motion to Reopen/ prima facie eligibility & timeliness

If an alien's case is pending before the Board of Immigration Appeals (BIA) or the Ninth Circuit, the alien must file a motion to reopen his case and have the case remanded to the IJ in order to apply for adjustment of status. In order to have a motion to reopen granted, an alien must show that he is *prima facie* eligible for

adjustment of status. This requires the alien to demonstrate eligibility for a visa petition, a current priority date, admissibility, and a copy of a completed adjustment of status application (form I-485). If the alien does not provide all of these items, the motion to reopen may be denied. *See Malhi v. INS*, 336 F.3d 989, 994 (9th Cir. 2002). If the alien does meet the above requirements, the BIA may reopen and remand the case to the IJ for a complete adjudication of the adjustment of status application. *See Matter of Velarde-Pacheco*, 23 I. & N. Dec. 253 (BIA 2002).

Although the BIA has the authority to grant a motion to reopen at any time, typically an alien may only file one motion to reopen and the motion to reopen must be filed within 90 days of a final decision by the BIA. *See* 8 C.F.R. 1003.2(a) & (c). Exceptions to the motion to reopen numerical and time deadlines may be made if the BCIS joins in the motion to reopen, if alien is seeking to reopen in absentia removal proceedings, or if the alien seeks to reopen an asylum or withholding of removal case in order to demonstrate changed circumstances. *See* 8 C.F.R. § 1003.2(c)(3). It is entirely within the discretion of the BCIS to join a motion to reopen, but the legacy Immigration and Naturalization Service's General Counsel has stated that an untimely motion to reopen will be joined only in exceptional and compelling circumstances. *See* 73 Interpreter Releases 1428 (Oct. 11, 1996). The motion to reopen time and numerical deadlines may also be equitably tolled when the alien is prevented from filing the motion due to ineffective assistance of counsel. *See Iturribarria v. INS*, 321 F.3d 889, 897-98 (9th Cir. 2003).

The finality of a removal order is not affected by the filing of a motion to reopen, and thus the BIA may adjudicate a motion to reopen even when the alien has petitioned for review of the underlying removal order. *See Stone v. INS*, 115 S.Ct. 1537, 1549 (1995). If the BIA grants the motion to reopen while the petition for review is pending in the circuit court, the circuit court loses jurisdiction over the petition for review as there would not longer be a "final order of removal." *See* 8 U.S.C. § 1252. If the BIA denies the motion to reopen, the denial may be appealed to the circuit court. *See id.*

7. Adjustment of Status Application Approved

When an adjustment of status application is approved, the alien receives lawful permanent residence (a green card). In most preference visa cases, the alien will have been able to include his immediate family members' applications in his adjustment of status application, and they will also receive lawful permanent residence. *See* 8 U.S.C. § 1153(d). Immediate relatives, however, are not allowed to include family members in their adjustment of status applications.

8. Immigrant visa application at consulate abroad

An alien who has been removed from the U.S. still may apply for permanent residence at the U.S. consulate in his home country. The alien is subject to all of the grounds of inadmissibility listed in 8 U.S.C. § 1182, with 8 U.S.C. § 1182 (a)(9)(A) and (B) causing the most frequent problem for aliens in these circumstances. The immigrant visa application at a consulate abroad is adjudicated by the Department of State and is governed by the Department of State regulations.

Adjustment of Status in Removal Proceedings

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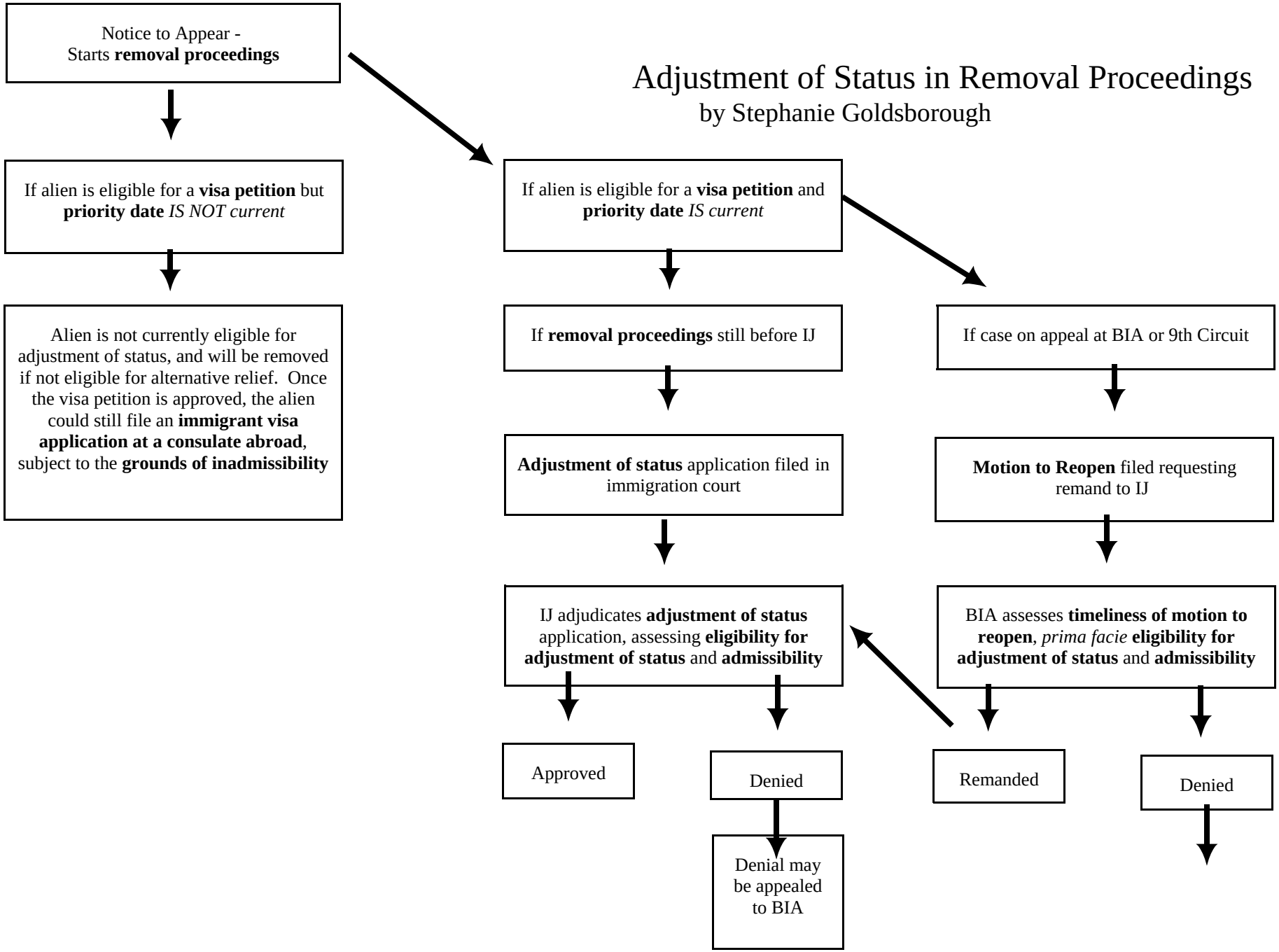

Denial may
be appealed
to 9th Circuit